

RAY W. FERGUSON

IBLA 75-415

Decided September 30, 1975

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting the application to purchase a headquarters site and canceling claim AA-3748.

Affirmed.

1. Alaska: Headquarters Sites -- Alaska: Possessory Rights -- Surveys of Public Lands: Generally -- Withdrawals and Reservations: Generally

There can be no "valid existing right" in a claimant of a headquarters site on land withdrawn by Public Land Order 4582 unless a notice of location or application to purchase had been filed in accordance with the Act of April 29, 1950. The filing of an application for a survey of omitted land did not by itself create any preference rights to the land.

2. Alaska: Headquarters Sites -- Alaska: Possessory Rights -- Surveys of Public Lands: Generally

Notices of location for headquarters sites must be accepted for filing by the authorized Bureau of Land Management office if the land has been subject to location during the preceding 90 days. The fact that land had been omitted from the original survey is not a valid reason for the Bureau of Land Management to refuse to record a properly filed notice of location for a headquarters site.

3. Alaska: Headquarters Sites -- Alaska: Possessory Rights -- Withdrawals and Reservations: Generally

An application to purchase a headquarters site is subject to rejection if it is filed after the 5-year period from the filing of a notice of location of the claim, or, if no notice had been filed, it was filed more than 90 days after the land has been withdrawn.

4. Alaska: Headquarters Sites -- Equitable Adjudication: Generally

Equitable adjudication is not appropriate where a headquarters site applicant has not substantially complied with the law.

APPEARANCES: Ray W. Ferguson, pro se.

#### OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On August 1, 1969, Ray W. Ferguson filed an application to purchase headquarters site AA-3748, under the Act of March 3, 1927, as amended, 43 U.S.C. § 687a (1970). The site was an island designated lot 5 in sec. 9, T. 24 N., R. 4 W., S.M. In a decision dated March 17, 1975, the Alaska State Office, Bureau of Land Management (BLM), rejected appellant's application and canceled his claim for the reason that the land was not available for settlement. Appellant has taken this appeal from the BLM State Office decision.

Appellant has requested we review the entire history of this matter to fully understand his predicament. We have done so. In late 1963, appellant filed a "Notice of Location of Settlement or Occupancy Claim in Alaska" for the island, which had been omitted from the original survey of section 9. The notice was dated November 18, 1963, but the record does not show when the BLM Anchorage Office received it. On December 31, 1963, the BLM Office informed appellant that:

It has been determined that the "unsurveyed" island \* \* \* is land omitted from the original survey; therefore, an application for survey must first be made according to the regulations in 43 CFR 280.5-10 [now 43 CFR 9185.2-2(f)] and as outlined in the enclosed Circular No. 1957.

Until survey there is no land to file upon; therefore, your location notice is unacceptable for recordation. \* \* \*

On June 23, 1964, appellant filed an "Application for Survey of Islands or Omitted Public Lands" together with the necessary evidence of the prior existence of the island and copies of notices to State of Alaska officials that the application was being filed. (The State of Alaska owned the surrounding surveyed lands.) The survey plat designating the island as lot 5 of section 9 was not officially filed until June 1, 1969. Appellant then filed his application to purchase on August 1, 1969.

Following a field examination in 1972, the field examiner concluded in his report that the evidence of use of the land did not support appellant's claimed use of the island as a headquarters site. The examiner recommended that appellant's application to purchase not be accepted and that adverse action be taken to cancel the claim.

On December 5, 1974, a contest complaint against appellant was filed in the Alaska State Office. The complaint charged that appellant had not properly used the headquarters site as required by law and further charged that appellant failed to file his application to purchase within 5 years after filing a notice of location. This complaint was withdrawn without prejudice on December 17, 1974, before appellant had filed an answer to it. Finally, on March 17, 1975, the BLM State Office rejected appellant's application to purchase and canceled his claim as stated above.

The final BLM decision canceling appellant's claim is based on a series of withdrawals of unreserved public land in Alaska from all forms of appropriation beginning with Public Land Order (P.L.O.) 4582, 34 F.R. 1025 (1969). As these withdrawals were all "subject to valid existing rights," the decision pointed out to appellant:

\* \* \* Instructions contained with the application survey of the omitted island filed by Ray W. Ferguson on June 23, 1964, specifically state that no preference right to acquire public lands will be gained by the filing of an application for survey. \* \* \*

Appellant argues that the withdrawals affected his application only because BLM and the Department delayed so long in completing and approving the survey. While it is true that the time spent by the Department in processing the survey affected appellant's application, this would not by itself justify reversing the State Office decision. Though there have been delays by BLM and some adjudicative errors, we see no basis for granting appellant's application.

[1] P.L.O. 4582 was in effect at the time appellant filed his application to purchase. The withdrawal order preserved "valid existing rights." However, there can be no "valid existing right" in a claimant of a headquarters site at the effective date of P.L.O. 4582 if a notice of location or application to purchase has not been filed as required by section 5 of the Act of April 29, 1950, 64 Stat. 95, 43 U.S.C. § 687a-1 (1970). Rene P. Lamoureux, 20 IBLA 243, 245 (1975); Ralph Edmund Marshall, 14 IBLA 233, 235 (1974); Kennecott Copper Corp., 8 IBLA 21, 79 I.D. 636 (1972). Since appellant filed his application to purchase subsequent to the effective date of P.L.O. 4582, he must show that he timely filed a notice of location and occupied the land prior to the withdrawal. As the State Office informed appellant, the filing of an application for the survey of omitted land does not by itself create any preference rights in the face of a withdrawal. 43 CFR 9185.2-2(f).

[2] This Board has previously held that a notice of location for a headquarters site must be accepted for filing by the authorized land office if the land has been subject to location during the preceding 90 days. James Milton Cann, 16 IBLA 374 (1974). The BLM Anchorage Office in its letter of December 31, 1963, refused to record appellant's notice of location because the land had been "omitted from the original survey." However, the only authority recited by BLM, 43 CFR 280.10 and Circular 1957, pertains to the procedures to be followed in order to obtain original surveys and surveys of omitted land (now codified as part of 43 CFR Part 9100, particularly sections 9185.1 and 9185.2). There is no reference in these regulations to recordation of notices of location for any land requiring a survey. The statutes and regulations governing headquarters sites in Alaska allow the filing of notices of location on "unsurveyed" land. 43 U.S.C. § 687a to § 687a-6 (1970), and 43 CFR Subpart 2563 (formerly 48 U.S.C. §§ 461-66 (1958), and 43 CFR Part 64 (1954)). These statutes and regulations do not differentiate between "unsurveyed" land and "land omitted from a survey." Therefore, the fact that the land had been "omitted from the original survey" was not a valid ground for refusing to record appellant's notice of location.

We held in James Milton Cann, *supra*, that in certain situations, a notice of location which has been tendered but not accepted for filing will be deemed filed as of the date of tender. For the purpose of this decision, we shall assume appellant had a notice of location on record prior to the effective date of P.L.O. 4582.

[3] The mere filing of a notice of location, however, does not establish a "valid existing right." An applicant must also show that the site was being used at the time P.L.O. 4582 became effective as a "headquarters" in connection with a trade, manufacture or other productive industry. Donald Richard Glittenberg, 15 IBLA 165, 168-69 (1974); *see* Vernon L. Nash, 17 IBLA 332 (1974);

Lynn E. Erickson, 10 IBLA 11, 80 I.D. 215 (1973). He must then perfect his claim by filing a purchase application. The Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970), requires that such an application to purchase must be filed within 5 years after the filing of the notice of location. Although we do not know the exact date appellant tendered his notice of location, it was sometime between November 18, 1963, the date it was signed by Ferguson, and December 31, 1963, the date of the BLM reply. Therefore, when he filed his application to purchase on August 1, 1969, he was not in compliance with the 5-year requirement. The purchase application was subject to rejection for being filed after the 5 years from the notice of location, or if no notice were deemed to have been filed, the purchase application suffers from the defect of being filed more than 90 days after the land was withdrawn by P.L.O. 4582.

[4] If there were no other obstacles in this case, the only remedy for appellant would be to consider whether the late-filed purchase application could be accepted under the equitable adjudication authority prescribed in 43 CFR 1871 and 43 U.S.C. §§ 1161-1164 (1970). The regulation and statute require, however, that the "law be substantially complied with" and that there be "no adverse claim." Equitable adjudication relief would not be appropriate in this case because there has not been substantial compliance with the law.

Appellant's purchase application stated the island was used as a headquarters for "guiding, hunting and fishing parties" and "also for trapping." The only improvements indicated are a tent frame, tent and tent frame floor, with an estimated total value of \$500. Appellant submitted supporting proof. This included statements from witnesses, personal acquaintances -- not clients, dated December 26, 1972, and January 2, 1973, that they knew the applicant and knew from personal observation that he had used the island for a headquarters site. Business records submitted by appellant show the nearest evidence of use to be a guide report indicating hunting about 30 miles from the headquarters site. Two other guide reports concern moose kills near Trading Bay, which is a considerable distance from the headquarters site. He showed guide licenses for 1966 through 1969, business revenue licenses for 1966 and 1967 showing big game guiding, and the same type of license for 1968 for rental property, and 1969 for amusement and/or recreation service. Business license returns show gross receipts for rental property and big game guiding for 1966 amounting to \$150 (with a note that rental did not start until January 1967), and 1967 for \$3,395 (a Federal tax return for that year showed gross receipts for a sole proprietorship for guide service as \$470 and a net loss of \$2197.65). A wolf bounty certificate dated February 27, 1968, shows the wolf was taken in the vicinity of the Gulkana River. This is over 100 miles from the headquarters site. A coyote bounty certificate dated March 25, 1968, shows a coyote taken in the vicinity of Alexander Lake, which is approximately 44 miles southwest of

the headquarters site. A guide-client contract agreement dated September 3, 1968, for a fly-in moose hunt does not disclose where the hunt was located. None of the information, except the general statements by the two witnesses that the site was used for a headquarters, ties appellant's business ventures to any use of the island.

The field report states there is no evidence of use of the island as a headquarters, the only evidence of use being one camp-fire site. The field examiner found no trails, boat landings, aircraft tie-downs, other campsites, or improvements on the island. Appellant has indicated he has been ready, willing and able to build a cabin on the island for many years, but has not done so.

The regulations require an applicant for a headquarters site to show, inter alia, the actual use and occupancy of the land for a headquarters, and the location of the tract applied for with respect to the place of business and other facts demonstrating its adaptability to the purpose of a headquarters. 43 CFR 2563.1-1(a)(2) and (5). Regulation 43 CFR 2563.1-2 also cautions that "[c]are will be taken in all cases before patent issues to see that the lands applied for are used for the purposes contemplated by the said act of March 3, 1927 [43 U.S.C. § 687a], and that they are not used for any purpose inconsistent therewith."

The showing submitted by appellant is insufficient to establish that the site was actually used to any extent as a headquarters for appellant's guide business. The information, at best, shows that prior to 1969 appellant's guide business generally was only slight and operated at a loss. There has not been substantial compliance with the law as required and envisaged for equitable adjudication relief. 1/

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1/ We note the record reveals that the State of Alaska may be an adverse party to the land. The status plat shows a State selection application A-058730 dated February 18, 1963, for the mineral estate and covering all the township. It also shows another State selection application for the entire township excluding prior valid rights, claims or patented lands, A-052881, amended December 15, 1965, and June 16, 1972. The serial number is earlier than A-058730; therefore, the original A-052881 must have been filed prior to February 18, 1963. Both selection applications were filed prior to appellant's notice of location and August 25, 1963, date of occupancy stated in the notice. If the selection applications embraced the land covered by his application, the land was segregated from settlement under the headquarters site law when appellant asserted his occupancy of the site began. 43 CFR 2091.6-4. His notice of location would have been unacceptable for recordation and his purchase application subject to rejection for this reason in

The dissenting opinion suggests an estoppel against the United States in this case. While the opinion quotes extensively from United States v. Wharton, 514 F.2d 406 (9th Cir. 1975), regarding estoppel, it fails to discuss the overwhelming majority of cases which preclude the application of estoppel against the United States where to do so would, in effect, make a conveyance of public land contrary to law. E.g., United States v. California, 332 U.S. 19 (1947); Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), cert. denied, 383 U.S. 937. Moreover, the dissenting opinion fails to explain what is accomplished by finding an estoppel operating for appellant here. It is difficult for us to understand the dissent's position since there is no analysis of how the doctrine applies to the facts of this case. We see no detriment to the appellant here as generally required for estoppel. We cannot agree that by merely stating estoppel applies, specific requirements of the law are excused and administrative officials may convey public lands contrary to statutory requirements. Estoppel cannot be used as a substitute for substantial compliance with the law. Since we find appellant has failed to show he substantially complied with the law by using and improving the land as a headquarters site, there is no authority for permitting appellant's application.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision rejecting appellant's application is affirmed for the reasons stated above.

Joan B. Thompson  
Administrative Judge

I concur:

Martin Ritvo  
Administrative Judge

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fn. 1 (continued)

addition to the grounds set forth above. It is unnecessary to do more than note this problem because substantial compliance with the law and the absence of an adverse party are independent requirements for equitable adjudication. 43 U.S.C. §§ 1161-64 (1970). Because appellant failed to show substantial compliance, the question of the adverse party becomes moot in considering whether equitable adjudication can be invoked.

## ADMINISTRATIVE JUDGE FISHMAN DISSENTING IN PART:

I agree that the filing of a notice of location in accordance with the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970), within 90 days after settlement, is necessary to preserve the settler's rights. I also agree that the Bureau of Land Management was in error in not accepting the tendered notice of location and it is to be regarded as filed when tendered. James Milton Cann, 16 IBLA 374 (1974).

I have difficulty, however, with the holding that equitable adjudication is not appropriate in the case. Moreover, I believe that estoppel against the United States operates.

After appellant attempted to file his notice of location he was informed that:

Until survey there is no land to file upon; therefore, your location notice is unacceptable for recordation.

That statement of December 31, 1963, as to unacceptability of the tendered location notice is in error, as stated above. But the BLM's statement would impel the conclusion that no filing on the land would be acceptable until the land had been surveyed.

The plat of survey was officially filed on June 1, 1969, and appellant filed his application to purchase on August 1, 1969, which supports the conclusion that it was his interpretation of the letter of December 3, 1963, which impelled him to await the filing of the plat of survey.

In a recent case the Ninth Circuit Court of Appeals, which embraces the State of Alaska in which the land in issue is situated, applied the doctrine of estoppel against the Government in a similar situation described below. In United States v. Wharton, 514 F.2d 406, 409-12 (9th Cir. 1975), rev'g, Minnie E. Wharton, 4 IBLA 287, 79 I.D. 6 (1972), the Circuit Court stated:

The government maintains that the rule is settled that estoppel cannot be invoked against the government, citing U.S. Immigration and Naturalization Service v. Hibi, 414 U.S. 5 \* \* \* (1973). In Hibi, a citizen of the Philippines petitioned for citizenship in September 1967 under the Nationality Act of 1940 which allowed certain aliens to obtain United States citizenship while serving in the United States Armed Forces during World War II. Under that Act a petition had to be filed by December 31, 1946. Hibi argued that the government was estopped from raising the statute of

limitations because it had not advised him of his right to apply for citizenship while he was serving in the Army. The majority of the Court did not believe that simply failing to advise the respondent of his rights was sufficient to estop the government:

"As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest. \* \* \*' Utah Power and Light Co. v. U.S., 243 U.S. 389, 409."

Hibi, 414 at 8, 94 S. Ct. at 21.

However, there was a vigorous dissent, and the majority qualified its holding by saying that, although the question of whether affirmative misconduct (rather than mere neglect) on the part of the government might estop it had been left open in Montana v. Kennedy, 366 U.S. 308, 314, 315 \* \* \* (1961), no such conduct was involved in Hibi. The Court did not preclude invoking estoppel against the government.

In the case before us, the Whartons assert affirmative misconduct on the part of BLM officials, not merely a failure to advise them of their rights. John Wharton had approached government officials to determine what his family could do to gain title to the land. Those officials misrepresented to him that there was no way at a time when it was still possible to do so.

The Government suggests that, even if it had told the Whartons prior to May 11, 1967 that they could file a new desert-entry application, such advice would have availed them nothing since the land would first have to be classified for settlement.

\* \* \* \* \*

The Secretary also argues that the Whartons' reliance on United States v. Georgia-Pacific Corporation, 421 F.2d 92 (9th Cir. 1970), is misplaced since it concerned a private contract rather than an attempt to gain title to public lands. In Georgia-Pacific we held that estoppel could be applied against the government, saying

that "the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case." Id. at 103.

Since Georgia-Pacific we have made it clear that estoppel may be applied against the government acting in its sovereign capacity. See United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973). And our decision in Standard Oil Co. v. California, 107 F.2d 402, 416 (9th Cir. 1939), indicates recognition of the principle that estoppel can apply against the government even in disputes over public land, although in that case no sufficient showing of laches or estoppel was made.

This circuit's position on estoppel and its availability as a defense against the government was clearly expressed in United States v. Lazy FC Ranch, supra. This court there allowed estoppel to be invoked against the government in an action by it to recover excess payments made to several partners under the Soil Bank Program. The government had helped to arrange and had approved a contractual agreement which enabled the partners to qualify for the payments. It was this arrangement which the government was contesting. In applying estoppel against the government, we relied on Moser v. United States, 341 U.S. 41 \* \* \* (1951), in which the Supreme Court permitted the government to be estopped even though it was acting in a sovereign capacity. To do otherwise, the Court indicated, would violate notions of "elementary fairness." Id. at 47. In Lazy FC Ranch we noted that this court had previously followed the Moser rationale and permitted estoppel to be used against the government where basic notions of fairness required it to do so, citing Schuster v. C.I.R., 312 F.2d 311 (9th Cir. 1962), and Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).

We summarized these prior decisions in Lazy FC Ranch by saying:

"The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel . . . . This proposition is true even if the government

is acting in a capacity that has traditionally been described as sovereign . . . although we may be more reluctant to estop the government when it is acting in this capacity.

481 F.2d at 989. (Emphasis added.)

\* \* \* \* \*

The test of estoppel applied in this circuit was outlined in Georgia-Pacific, 421 F.2d at 96:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

#### ELEMENTS OF ESTOPPEL

The affirmative misconduct of which the Whartons complain consists of the following:

(1) the BLM at Vale gave John Wharton erroneous advice in 1957; and

(2) officers of the BLM made misrepresentations to John Wharton through Congressman Ullman prior to May 11, 1967, when the land was finally withdrawn from entry.

\* \* \* \* \*

Using the test of estoppel as outlined in Georgia-Pacific, *supra*, it is undeniable that all the elements of estoppel have been met. The BLM clearly knew (or should have known) that the Whartons could still file a desert entry application, and that in the near future a proposed classification would be made which withdrew the land from entry. The BLM had every reason to believe that the Whartons would act on its advice. The Whartons were ignorant of the true facts or they would have filed an application without making inquiry of the BLM. There is no question that they relied to their detriment on the erroneous advice given to them by the BLM. Thus there exist both misleading statements and conduct which

would give rise to estoppel between private parties, bringing the Wharton's claim within the exceptions suggested in both Cappaert and Hibi. [Footnotes omitted.]

In the case at bar, appellant was misled by being told in essence that no filing would be accepted until the land was surveyed. He acted on that advice to his detriment.

The foregoing discussion and the holdings of the main opinion may be moot. As the main opinion indicates tangentially, prior to the commencement of appellant's occupancy the State filed selection application A-052881, which if it embraced the land in issue, segregated it from any adverse appropriation. 43 CFR 2627.4(b); State of Alaska, 6 IBLA 58, 79 I.D. 391 (1972). I believe that we should obtain that record so its impact may be determined upon the case at bar before addressing ourselves to the other issues in the case which may be rendered moot.

Frederick Fishman  
Administrative Judge

